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Hartalega Sdn Bhd v Shamsul Hisham bin Mohd Aini

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–102 OF 2002
WAN AFRAH JC
23 MARCH 2004

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Labour Law — Employment — Dismissal — Probationer — Whether probationer enjoys same rights as confirmed employee

Labour Law — Employment — Dismissal — Probationer — Performance — Test for performance — Whether performance evaluation taken into account — Whether Industrial
C *Court erred by exercising own evaluation*

Labour Law — Industrial Court — Award — Whether punitive compensation can be awarded

The respondent was employed by the applicant as a system support workman
D subject to a probationary period of three months. Upon expiry of the probationary period, the respondent was not confirmed and was released from his employment by the applicant. The respondent was correspondingly informed by a letter that his performance did not meet the standards required by the applicant. The Industrial Court ('the IC') found that the dismissal of the respondent was without just cause and excuse and awarded punitive
E compensation to the sum of RM25,000 to the respondent. This was the applicant's application for an order of certiorari to quash the IC award on the grounds, among others, that the IC had erred in law by applying the wrong test in deciding that the dismissal of the respondent was without just cause and excuse and by awarding the above punitive compensation.

F **Held**, allowing the application for certiorari:

(1) In *Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376, it was enunciated that a probationer enjoys the same rights as a confirmed employee, and his or her service cannot be terminated without just cause or excuse (see para 12).

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(2) Merely bringing the probationer within the ambit of s 20 of the Industrial Relations Act 1967 ('IRA') does not automatically imply that the probationer is elevated to the status of a confirmed employee as this was not the intention of the legislature (see para 12).

(3) It was wrong for the Chairman of the IC to adopt the principles in *Ireka*
H and *Rooftech* which only refer to confirmed employees. The rigid test as expounded in the said case should not be applied to employees on probation, especially with regard to requiring a written warning. The monthly appraisal report produced by the applicant and which was communicated and discussed with the respondent was sufficient for
I reason of dismissal (see para 12).

(4) It was conditional for a probationer to perform his functions to the satisfaction of his employer. Failure to do so would render the probationer

liable to be dismissed, save that such a decision must not be capricious or arbitrary. The Chairman of the IC did not refer to this in his award, instead he used the procedural test of poor performance relating to the dismissal of a confirmed employee for poor performance. He failed to apply the correct test in relation to a probationer and the subject of dismissal (see para 12).

(5) The Chairman of the IC harped on the fact that he was relying on *Khaliah*'s case, but a careful perusal of his award does not disclose a discussion of bona fides, which is essential in the dismissal of an employee on probation as propounded in the aforesaid case — yet at the conclusion of his award, he made a finding that the dismissal of the respondent was made mala fide on the applicant's part (see para 12).

(6) The IC had erred in law in that it misconstrued the law relating to probationers and that the entire basis of its award was flawed as it was premised on a misapprehension of the law (see para 12).

(7) The IC failed to consider the performance evaluation undertaken by COW2 (applicant) and that the IC had substituted the judgment and evaluation of the applicant with its own, which he was not entitled to. Hence, the IC had committed an error of law (see para 17).

(8) The Chairman of the IC did not merely draw inferences and opinions that the respondent was victimized. On the contrary, a careful reading of his award indicated that he had made a finding that the respondent was victimized (see para 22).

(9) Section 30(6) of the IRA does not confer the jurisdiction nor power for the court to consider and decide a matter unpleaded by concluding that the dismissal of the respondent amounted to an act of victimization, which was obviously an error of law (see para 22).

(10) The IC in awarding the punitive sum on account of exploitation of labour failed to consider that the respondent had only served the applicant for three months, and in the absence of labour exploitation or mala fide motives being pleaded, it was an error of law (see para 27).

(11) The compensation of RM25,000 was excessive, more so, when the respondent was employed for so brief a period (see para 27).

[Bahasa Malaysia summary

Responden bekerja dengan pemohon sebagai peyokong sistem tertakluk kepada tempoh percubaan tiga bulan. Bila tempoh percubaan tamat responden tidak disahkan dan ditamatkan dari pekerjaannya oleh pemohon. Responden juga dimaklumkan melalui surat bahawa perlaksanaan pekerjaan responden tidak mencapai taraf yang diperlukan oleh pemohon. Mahkamah Perusahaan ('MP') memutuskan bahawa penamatan pekerjaan responden adalah tanpa tujuan dan alasan yang adil dan memberikan pampasan bersifatkan hukuman sebanyak RM25,000 kepada responden. Ini adalah permohonan pemohon bagi perintah certiorari untuk membatalkan award MP atas alasan bahawa,

antara lain, MP telah khilaf dari sisi undang-undang dengan memakai ujian yang salah untuk memutuskan penamatan pekerjaan responden adalah tanpa tujuan dan alasan yang adil dan dengan memberikan pampasan bersifat hukuman seperti yang dinyatakan diatas.

Diputuskan, membenarkan permohonan untuk certiorari:

(1) Di dalam *Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376, telah diputuskan bahawa seseorang pekerja dalam tempoh percubaan mempunyai hak yang sama seperti pekerja yang telah disahkan, dan perkhidmatan beliau tidak boleh ditamatkan tanpa tujuan dan alasan yang adil (lihat perenggan 12).

(2) Dengan hanya membawa seseorang pekerja dalam tempoh percubaan dalam linkungan s 20 Akta Perhubungan Perusahaan 1967 ('APP') tidak secara otomatik bermakna beliau dinaikkan ke taraf seorang pekerja tetap kerana ia bukan niat badan perundangan (lihat perenggan 12).

(3) Adalah salah untuk Pengerusi MP memakai prinsip-prinsip di dalam *Ireka* dan *Rooftech* yang hanya merujuk kepada pekerja-pekerja yang telah disahkan. Ujian yang tegar seperti di dalam kes itu tidak patut dipakai kepada pekerja-pekerja yang masih di dalam tempoh percubaan, khususnya berkait dengan peruntukan amaran bertulis. Laporan penilaian bulanan oleh pemohon yang diberitahu dan dibincang dengan responden memadai untuk alasan pemecatan (lihat perenggan 12)

(4) Ia adalah syarat bagi seseorang pekerja dalam tempoh percubaan untuk menjalankan tugasnya ke tahap kepuasan majikannya. Kegagalan berbuat demikian boleh mengakibatkan pekerja dalam tempoh percubaan itu ditamatkan pekerjaannya tetapi keputusan itu tidak boleh yang tidak tegas dan rambang. Pengerusi MP tidak merujuk kepada ini di dalam award beliau tetapi memakai ujian prosedur pelaksanaan yang lemah berkait dengan pemecatan pekerja yang telah disahkan untuk pelaksanaan tugas yang lemah. Beliau gagal memakai ujian yang betul berkait dengan seorang pekerja yang masih dalam tempoh percubaan dan perkara pemecatan (lihat perenggan 12).

(5) Pengerusi MP berkata bahawa beliau bergantung kepada kes *Khaliah*, tetapi melalui satu penelitian award beliau, tidak didedahkan sebarang perbincangan bona fide, yang penting kepada pemecatan seorang pekerja yang masih di dalam tempoh percubaan seperti yang dikatakan di dalam kes itu — tetapi pada pengakhiran award beliau, beliau telah memutuskan bahawa pemecatan responden mala fide pada pihak pemohon (lihat perenggan 12).

(6) MP telah khilaf di sisi undang-undang dengan tersalah tafsir undang-undang yang berkait dengan pekerja yang masih dalam tempoh percubaan dan bahawa dasar award MP cacat sebab ia berdasarkan salah anggap undang-undang (lihat perenggan 12)

(7) MP telah gagal mempertimbangkan penilaian pelaksanaan yang dibuat oleh COW2 (pemohon) bahawa MP telah menggantikan penghakiman dan penilaian pemohon dengan penghakiman dan penilaian MP, yang

tidak berhak dibuat olehnya. Oleh itu, MP telah melakukan kekhilafan undang-undang (lihat perenggan 17).

(8) Pengerusi MP tidak hanya membuat inferens dan berpendapat bahawa responden telah dijadikan mangsa. Sebaliknya, penelitian award beliau menunjukkan bahawa beliau membuat keputusan bahawa responden telah dijadikan mangsa (lihat perenggan 22).

(9) Seksyen 30(6) APP tidak memberi bidang kuasa atau kuasa kepada mahkamah untuk mempertimbangkan dan memutuskan perkara yang tidak diplidkan dengan memutuskan bahawa pemecatan responden adalah kelakuan menjadikan mangsa yang jelas kekhilafan undang-undang (lihat perenggan 22).

(10) MP dalam memberikan pampasan bersifat hukuman atas alasan pengeksploitan pekerja gagal mengambil kira bahawa responden hanya bekerja untuk pemohon selama tiga bulan, dan tanpa kehadiran pengeksploitan pekerja dan niat buruk diplidkan, ia adalah salah dari sisi undang-undang (lihat perenggan 27).

(11) Pampasan RM25,000 berlebih-lebihan memandangkan responden diambil bekerja untuk tempoh yang pendek (lihat perenggan 27).]

Notes

For cases on Industrial Court's awards, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241–1288.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 849–873.

For unjust dismissal, see 7 *Halsbury's Laws of Malaysia*, para [120.090].

Cases referred to

Dorsett Regency Hotel (M) Sdn Bhd v Andrew Jayadass James Ambroze [2003] 2 ILR 740 (refd)

Hotel Jaya Puri Bhd v National Union of Hotel Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (refd)

Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd [1997] 1 MLJ 376 (refd)

Koperasi Serbaguna Pekerja Felda Bhd v Zainal Ariffin bin Mohd Noor [1994] 2 ILR 862 (refd)

Nada Pakar Sdn Bhd v Radja Aritonang (2001) 3 ILR 58 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor [2000] 1MLJ 107 (folld)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 2, 20(1), (3), 33B(1)

Suganthi Singam (Shearn Delamore & Co) for the applicant.
G Perumal (A Saravanan with him) for the respondent.

Wan Afrah JC:

THE PARTIES

[1] The parties to this application are Hartalega Sdn Bhd ('the applicant') and Shamsul Hisham bin Mohd Aini ('the respondent').

FACTS OF THIS CASE

[2] Briefly the facts of this case are that on 24 April 2000, the respondent was employed by the applicant. The respondent was employed as a system support workman subject to a probationary period of three months. Upon expiry of the probationary period, the respondent was not confirmed and was released from his employment by the applicant. The respondent was correspondingly informed by a letter dated 24 July 2000 that his performance did not meet the standards required by the applicant.

[3] Pursuant to representations made by the respondent under s 20(1) of the Industrial Relations Act 1967 ('the Act'), the Honourable Minister of Human Resources referred his dismissal to the Industrial Court ('IC') under s 20(3) of the Industrial Relations Act 1967. The reference was then registered as IC Case No 7/4-447/01.

THE AWARD

[4] On 25 July 2002, the IC in its Award No 629 of 2002, awarded the case in favour of the respondent. In the said award, the IC ruled as follows:

(i) the dismissal of the respondent (a probationer) was without just cause and excuse; and

(ii) awarded punitive compensation a sum of RM25,000 to the respondent.

APPLICANT'S GROUNDS OF APPLICATION

[5] The applicant applied for an order of certiorari to quash the IC award and submitted four grounds for review as follows:

(i) The IC had erred in law when applying the wrong test in deciding that the dismissal was without just cause and excuse;

(ii) The IC had erred in law when it substituted the judgment and evaluation of the respondent's performance with its own, which it was not entitled to do;

(iii) The IC erred in law when it took irrelevant matters into consideration;

(iv) The IC had erred in law when it awarded punitive compensation in the amount of RM25,000.

RESPONDENT'S SUBMISSION

[6] The respondent submitted that the IC had not committed any jurisdictional error when delivering the said award.

GUIDED PRINCIPLES OF LAW

[7] In proceedings with an application for judicial review by way of certiorari, I am mindful of and hereby apply the following established principles:

(a) Judicial review is not concerned with the merits of the decision but the decision making process. It is trite law that IC awards are sheltered from review (and appeal) by virtue of s 33B(1) except on grounds of error of law.

(b) The High Court has the power to quash the impugned award pursuant to s 33B(1) if the IC commits an error of law or fact (see *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317).

(c) A decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for process, but also for substance, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

DECISION IN THIS APPLICATION

First ground

[8] In identifying whether the Chairman of the IC had applied the right test or a wrong test in deciding that the dismissal of the respondent was with or without just cause or excuse, it would be necessary to examine what was ruled in his award. An extract from the said award which is pertinent to this question is as follows:

> In the light of the Court of Appeal case of *Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376 which ruled that even a probationer came within the definition of a 'workman', to exclude the employer's conduct from scrutiny of the court in their allegations of non-performance and/or inefficiency of a probationer may tantamount to negation of the s 20(3) of the IRA provision conferring the court with jurisdiction to determine whether a dismissal is with or without just cause and excuse.
>
> At the same time, it is precisely the question of the evidentiary requirement placed on the employer whether the due process of the Ireka or Rooftech principles was complied, or proposed to be dispensed with vide the two authorities suggested:
>
> 1 *Azmi & Co*'s case
>
> 2 *KP Usahama*'s case
>
> which will enable the Court to determine, on the one hand, that if there was no evidence of such warning and or not addressed at the time of or prior to termination, it will provide a basis for the Court to believe that the employer's reasons and justifications in Court are but purely made up. On the other, if such evidence (of warnings) do exist and was addressed at time of or prior to termination, it will provide the Court with some basis to evaluate if indeed the fact of incompetence or non-performance has or has not been made out
>
> Whether a less stringent mode of test be made applicable to a Probationer is another question, which will depend entirely on new development following the *Khaliah*'s case at the higher or appellate level, if any, in a foreseeable future.

[9] With reference to the above extracted passage, both counsel submitted their arguments before me on the legality of the test by the IC in deciding a

dismissal case concerning a probationer. Arguments from both parties can be deduced as follows.

[10] Applicant's counsel:

(i) Submitted that *Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376 is an authority for the proposition that an employer cannot simply dismiss the probationer by way of termination simpliciter unless it is proven that the dismissal was with just cause and excuse.

(ii) As in *Khaliah*'s case, submitted that 'an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse'.

(iii) Contended that the authority in *Khaliah*'s case merely lays down the proposition that an employee on probation enjoys the same rights as a permanent employee. It does not state the standard required to be proven by the employer to justify that the termination of the probationer was with just cause and excuse was the same as that required of a confirmed employee.

(iv) Promoted *Dorsett Regency Hotel (M) Sdn Bhd v Andrew Jayadass James Ambroze* [2003] 2 ILR 740 (decided subsequent to the Court of Appeal decision in *Khaliah*'s case) reflecting the IC's cognizance in respect of the distinction between a probationer and a confirmed employee. In the *Dorsett* case, the IC held as follows:

> An employee on probation enjoys the same rights as a permanent or confirmed employee. A probationer's services must not be terminated without just cause or excuse. However, there is an intrinsic and material distinction between employees under probation and confirmed permanent employees. On this ground, as it was pronounced in *Vikay Technology Sdn Bhd v Ang Eng Sew*, an employee under probation ought not to be accorded with the same status, rights or privileges as a permanent employee. As long as the employer is reasonably satisfied that the employee is not suitable for the job, he may be removed.

(v) Submitted that the dismissal of a probationer must be bona fide as expounded in *Khaliah*'s case which stated the following:

> The requirement of bona fides is essential in the dismissal of an employee on probation, but if the dismissal or termination is found to be a colourable exercise of the power to dismiss or is a result of discrimination or unfair labour practice, the Industrial Court has jurisdiction to interfere and to set aside such dismissal.

(vi) Relied on *Koperasi Serbaguna Pekerja Felda Bhd v Zainal Ariffin bin Mohd Noor* [1994] 2 ILR 862, confirming that an employee on probation has to perform his functions to the satisfaction of his employer. The IC ruled as follows:

> As to the rights of a probationer, the Court prefers to adopt the principles laid down by the common law. It was necessary, first, to ascertain what is exactly meant by the word 'probation'. The dictionary meaning has been given as the 'testing of conduct or character of a person' and the probationer is one who 'is on trial or in a state to give proof of certain qualifications for a place or status.' The idea of probation in all cases of services contracts is, therefore, a testing of the character and capabilities

of the servant on the employee's side and also a testing of the conditions of service on the employer's part.

The period of probation in a service contract case, therefore, may be taken as a communication by the employer that in case the employee proves himself within the period of probation to the satisfaction of the employer, that he, the probationer, is a fit and proper person to perform the duties for which he has offered his services, the probationer would be entitled to be confirmed or taken in on a permanent basis. The appointment of a person on probation is therefore, tentative and dependent on the employer's satisfaction as to his suitability. But this satisfaction must be a reasonable satisfaction and not an arbitrary or capricious one, …'

(vii) Concluded that there was a misapplication of the correct test when the IC found that the dismissal of the respondent was without just cause and excuse. The correct test should have been as follows:

whether there was sufficient reason to suggest that the respondent had failed to perform to the satisfaction of the employer and whether the decision of the employer was made bona fide and not capricious?

[11] Respondent's counsel:

(i) Submitted that, as was enunciated in *Khaliah*'s case, an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause and excuse. That therefore, the IC has jurisdiction to hear a complaint for the wrongful dismissal of a probationer.

(ii) Recognized the probationer was a workman within the purview of the definition of s 2 of the Industrial Relations Act 1967 ('IRA'). That the probationer fell within the ambit of s 20(1) of the IRA and that the test and standard required by the employer to be applied to the probationer would be the same as the permanent employee.

(iii) Submitted that the probationer and permanent employees were no different in essence and substance and that the law on dismissal would be same for both categories of workman and shared the same rights. Upon termination, a further requirement for bona fides applied.

(iv) Agreed that the probationer had to perform his functions to the satisfaction of the employer. Contended that the probationer had performed his job to the average level, and above, as required by the applicant for confirmation.

(v) Submitted that the applicant gave no warning of the possibility of dismissal when the probationer's work performance was discovered/found to be unsatisfactory. Argued that therefore, the applicant was not bona fide in dismissing the employee and had practiced exploitation of labour.

(vi) Supported the IC's application of the tests in *Rooftech* and *Ireka* when evaluating the inefficiency, incompetence or non-performance of a workman. In *Rooftech*, the court held as follows:

Inefficiency which discloses a course of negative conduct no doubt is a sufficient ground for termination but there must necessarily be sufficient proof that a procedure

had been followed. Ordinarily there must be sufficient written communications to the claimant in order to establish inefficiency or poor performance before the company can rely it to justify dismissal.

(vii) Supported the IC's decision. Submitted that the IC had not erred in law and had applied the correct test when deciding that the probationer's dismissal had been without just cause or excuse.

[12] This court's findings:

(i) Having perused *Khaliah*'s case, it was very obvious to me that the Court of Appeal has enunciated that a probationer enjoys the same rights as a confirmed employee, and his or her service cannot be terminated without just cause or excuse.

(ii) It appeared to me that *Khaliah*'s case does not explain or state the standard required to be proved by the employer to justify the probationers termination is with just cause and excuse and that the standard is the same as that required of a confirmed employee.

(iii) I approved John Louis O'Hara's (the Chairman of IC) statement in the *Dorsett*'s case who commented that *Khaliah*'s case does not expound the substantive law pertaining to a probationer but relates to the specific question that if a probationer is to be terminated, it should be within the general purview of s 20(3) of the Act in that it should not be without just cause or excuse.

(iv) Having scrutinized the award, it does seem to me that the Chairman of the IC interpreted *Khaliah*'s case per se and came to the conclusion that since a probationer is a workman within the meaning of s 20(1), therefore the same standard is to be applied to both a probationer and a confirmed employee in reference to dismissal.

(v) To my mind, I subscribe to the concept/principle that there should be a distinction between the two categories of workman. I verily believe that merely bringing the probationer within the ambit of s 20 of the Act does not automatically imply that the probationer is elevated to the status of a confirmed employee as this was not the intention of the legislature in enacting s 20(3) of the IRA.

(vi) To my mind, it was wrong for the Chairman of the IC to adopt the principles in *Ireka* and *Rooftech* which only refer to confirmed employees. My opinion is that the rigid test as expounded in the said case should not be applied to employees on probation, especially with regard to requiring a written warning. To me, the monthly appraisal report produced by the applicant and which was communicated and discussed with the respondent was sufficient for reason of dismissal.

(vii) I noted both counsel agreed that it was conditional for a probationer to perform his functions to the satisfaction of his employer. Failure to do so would render the probationer liable to be dismissed, saved that such a decision must be not capricious or arbitrary. However, the Chairman of the IC did not refer to this in his award, instead he used the procedural

test of poor performance relating to the dismissal of a confirmed employee for poor performance. Hence to my mind, he failed to apply the correct test in relation to a probationer and the subject of dismissal.

(viii) It also appeared to me that the Chairman of the IC harped on the fact that he was relying on *Khaliah*'s case, but a careful perusal of his award does not disclose a discussion of bona fides, which is essential in the dismissal of an employee on probation as propounded in the aforesaid case — yet at the conclusion of his award, he made a finding that the dismissal of the respondent was made mala fide on the applicant's part.

(ix) I lean in support of *Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor* [2000] 1 MLJ 107, which asserted that the power to either continue or discontinue the services of an employee or probationer rested with the employer. Faiza Tamby Chik J held as follows (at p 122):

> At the end of the applicant's probationary period, it was open to the second respondent to either continue or discontinue the services of the applicant. The applicant, by virtue of being a probationer, had no say in the matter and the second respondent, as the employer, was fully entitled to terminate his services upon their evaluation that he did not perform his job functions satisfactorily. The first respondent correctly recognized that it was the second respondent's prerogative as an employer to assess and determine the standard of performance of the applicant vis-a-vis the expected level of performance by the second respondent.

(x) By reason of the foregoing, I find that the IC had erred in law in that it misconstrued the law relating to probationers and that the entire basis of its award was flawed as it was premised on a misapprehension of the law.

Second ground

[13] Prior to making any findings and a ruling as to this particular ground before me, it would be necessary to look at what the Chairman of the IC said in this award:

> The Court, will rule that these appraisals were merely monthly assessment of the Claimant's performance who managed to secure only the Average rating.
>
> Nowhere it is stated, nor even asserted in Court by Company witnesses, to stipulate or 'warn' the Claimant, that if he did not achieve the next higher rating 'Good' by the third month, he had to leave. It was only a spontaneous decision at the end of the third month, at the average rating.
>
> Such specific warnings may not be necessary or apparent to the higher category of management staffs, but in the lower category such as the Claimant who was in the learning (on the job-training) process i.e. on probation, he must be specifically warned that if he failed to improve at the end of this probation, he will have to go. This was intact the unhappiness expressed by the Claimant, because he perceived he had performed satisfactorily, as he had not been warned on this.

[14] With reference to the above, it was left open to counsel to argue on the validity of such a judgment.

[15] Applicant's counsel:

(i) Asserted that the IC had trespassed into the province of the employer by evaluating and examining the performance of the respondent and by concluding that the latter's performance was not poor, contrary to the evaluation of the respondent's employer.

(ii) Argued that when the Chairman of the IC made the findings of fact as to the suitability and performance appraisal of the respondent, he had substituted the judgment and evaluation of the employer with his own.

(iii) Contended that since the IC had made a performance evaluation in the absence of any evidence of mala fide, it had obviously fallen into the category of an error of law.

(iv) Submitted that the IC had applied the procedure relating to dismissals of confirmed and a probationer employee on the same footing. The IC failed to appreciate the distinction between the two and accordingly committed an error of law.

[16] Respondent's counsel:

(i) Affirmed that the IC rightly evaluated the facts when it came to the conclusion that the respondent secured an average rating consistent within the applicant's requirements.

(ii) Contested that the applicant dismissed the respondent without complying with any warning procedures when the respondent was merely on the job training process in a lower category of employment.

(iii) Argued that the applicant's contention that the respondent lacked the requisite skill, knowledge and training was merely an afterthought.

(iv) Submitted that the IC did not in any respect substitute and evaluate the employee's appraisal on suitability and performance with its own. Further, the IC did not in any respect fall into an error of law. It was a case of the applicant not following the procedural requirements of dismissing the respondent.

[17] This court's findings: I stand to agree with the applicant's counsel that the IC failed to consider the performance evaluation undertaken by COW2 (applicant) and that the IC had substituted the judgment and evaluation of the applicant with its own, which he was not entitled to. Hence, I find that the IC had committed an error of law.

Third ground

[18] In examining what the relevant or irrelevant matters taken into consideration by the IC, it would be pertinent to reflect on the award made by the Chairman of the IC himself. In particular where the IC stated as follows:

> The Court opines that at least someone with greater experience, training or exposure and paid at least double or triple the salary paid to the Claimant, would be the

correct prerequisites to manage such an important portfolio to withstand or cope up with two million medical gloves per day, or to handle that sophisticated level of production.

[19] The above statement made by the IC had drawn dissatisfaction to the applicant who basically argued the following:

[20] Applicant's counsel:

(i) Submitted that the IC went on a frolic of its own in respect of labour exploitation. In the IC's opinion, the respondent's qualifications, background and training did not commensurate with the degree of responsibility required of the job function. Such a finding was totally irrelevant more so, when the respondent had not relied on such grounds in contending that his dismissal was without just cause or excuse.

(ii) Contended that the salary paid and the experience, training or exposure of the respondent were not matters for the consideration of the IC and that these were matters which had been mutually agreed to between the employer and the employee in this case.

(iii) Protested that when the IC concluded that the dismissal of the respondent was without just cause or excuse, the same court had evinced the applicant's conduct as having an ulterior or mala fide motive.

[21] Respondent's counsel:

(i) Submitted that the court took into account the respondent's qualification, background, training skill knowledge and competence as well as the respondent's salary of RM900 and the degree of responsibility required for the job function. The court was of the opinion that the facts demonstrated, reflected an element of labour exploitation tainted with ulterior or mala fide motives to victimize the respondent.

(ii) Contended that the IC had acted well within the scope of s 30(6) of IRA to include any thing or matter where the court thought it necessary or expedient. The court is not restricted from inferring any thing or matter from the pleaded fact to safe guard the law of industrial relations in the interest of industrial harmony. The IC was correct to hold such views and acted in accordance to equity, good conscience without regard to technicalities and legal form.

(iii) Affirmed that the court concluded its views in accordance to the substantial merits of the case. It did not question the agreed terms of the parties but merely drew inferences and opined on the pleaded facts.

(iv) Asserted that the IC had not committed any error of law by asking the wrong questions or taking into account irrelevant considerations or misconstrue the terms of the relevant statute and did not misapply or misstate a principle of general law.

[22] This court's findings:

(i) Clearly, I find that the Chairman of the IC did not merely draw inferences and opinions that the respondent was victimized. On the contrary, a

careful reading of his award indicated that he had made a finding that the respondent was victimized.

(ii) To my mind, s 30(6) of the IRA does not confer the jurisdiction nor power for the court to consider and decide a matter unpleaded by concluding that the dismissal of the respondent amounted to an act of victimization, which to me is obviously an error of law.

Fourth ground

[23] The IC in awarding the sum of RM25,000 to the respondent, held as follows:

> On the other hand, in appropriate cases like this, there ought to be a measure to reflect a punitive element wherein employers who manipulate workers for private gains or for other ulterior and mala fide motives, ought to be added in the compensation awarded by the Court.

[24] The above punitive award triggered another argument before me. Counsel for the applicant claimed that the award was excessive whereas counsel for the respondent claimed that it was appropriate. They contested as follows:

[25] Applicant's counsel:

(i) Submitted that the respondent had only served the applicant for three months and drew a monthly salary of RM900. The amount of RM25,000 awarded to the respondent was equivalent to almost 28 times/months salary and was said to be exorbitant, unreasonable, disproportionate and unjustifiable.

(ii) Contested that the decision was perverse, that no reasonable tribunal presented with the same facts and circumstances would have reached the same decision and submitted that the court should exercise its powers of judicial review to quash the said award.

(iii) Submitted that the Court of Appeal decision in *Koperasi Serbaguna Pekerja Felda Bhd v Zainal Ariffin bin Mohd Noor* [1994] 2 ILR 862, allowed the High Court jurisdiction in certiorari proceedings to determine whatever the quantum of compensation awarded by the IC was in accordance with law.

(iv) Contended that in absence of evidence of victimization, mala fide and unfair labour practice and also in the absence of the same being pleaded, it would follow that the ensuing award of RM25,000 made by the IC was erroneous.

(v) Relied on *Nada Pakar Sdn Bhd v Radja Aritonang* [2001] 3 ILR 58 which enumerated the correct principles of computation for compensation.

(vi) Contended that the IC's award on this aspect could not be allowed to stand.

[26] Respondent's counsel:

(i) Contended that the compensation was reasonable based on the IC's findings of fact that the applicant manipulated workers for private gain

by recruiting a candidate with lesser qualification, background and experience to perform a higher level of task which is capable only by a more qualified person. Hence, the punitive compensation was justified.

(ii) Asserted that the IC was vested with discretionary powers to grant compensation under s 30 of the IRA as per *Hotel Jaya Puri Bhd v National Union of Hotel Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109.

(v) Submitted that the IC was able to act equitably and in good conscience, within the limits of the common law principles of just and equitable in handing down its award with punitive element for compensation in lieu of reinstatement.

[27] This court's finding:

(i) The Chairman of the IC in awarding the said sum on account of exploitation of labour failed to consider that the respondent had only served the applicant for three months, and in the absence of labour exploitation or mala fide motives being pleaded was an error of law. Therefore, the award cannot stand.

(ii) Even if this court find that the dismissal of the respondent was without just cause and excuse, it is my considered opinion that the compensation of RM25,000 was excessive, more so, when the respondent was employed for so brief a period.

(iii) I am inclined to agree with the applicant's counsel that the objectives and intentions of s 30(4) and 30(5) of the IRA were clearly defeated when the compensation awarded was well in excess of the total salary the respondent received during his employment with the applicant.

CONCLUSION

[28] In view of the numerous jurisdictional errors committed by the IC, Ifind that the respondent's dismissal was with just cause or excuse. As such, the award of the Chairman of the IC is accordingly quashed with costs.

Application to quash Industrial Court award allowed with costs.

Reported by AG Kalidas